

The Sine Qua Non of Copyright is Uniqueness, not Originality

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The Supreme Court tells us that “[t]he sine qua non of copyright is originality.” The Court also tells us that originality has two components: independent creation by the author (as opposed to copying from prior work) and a minimal degree of creativity. I argue that the first component is over-inclusive and that the second is under-inclusive. The over- and under- inclusiveness roughly offset each other, so that courts usually reach the right outcome – but not without making a hash of copyright doctrine.

Courts will avoid making a hash of doctrine, and will more consistently reach the right outcome, when they recognize that the true sine qua non of copyright is uniqueness. A unique work is a work that no prior creator created before (novel) *and* that no subsequent creator could independently create later (unrepeatable). For instance, Lewis Carroll’s *Alice in Wonderland* is unique: no one created it before Carroll did and no one could independently create it later. In contrast, the powered airplane is repeatable. Although no one created before the Wright brothers, someone could have – indeed would have – independently created it later.

Originality is an imperfect surrogate for uniqueness. The first component of originality, independent creation, is very over-inclusive because it demands something less than novelty when in fact copyright demands unrepeatability as well as novelty. The first component of originality implies that copyright protects a second creator’s work even if it is indistinguishable from a first creator’s work, as long as the second creator did not copy it from the first. Copyright does not, contrary to popular opinion, protect work that could be repeated much less work that was actually repeated. Novelty is a necessary but insufficient condition of uniqueness. A work is novel if no one actually created it before. A work is unique only if no one actually created it before and if no one could create it later.

The second component of originality, creativity, is under-inclusive. Some non-creative work is unique and therefore protectable. A work is creative if it was created free of constraints. A work is unique *either* if it was created free of constraints *or* if it was created under constraints that were fleeting, localized or otherwise unable to dictate others’ work in the same way. Thus, though all creative work is unique, some non-creative work is also unique.

An example of non-creative yet unique work is video footage of a newsworthy event captured by a planted camera or by a bystander who happened to be at the right place and time. This footage entails no meaningful creativity – it was dictated by constraints, including the sheer occurrence of the event. Copyright protects this footage

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because it is unique. It is unique because the constraints that dictated it were fleeting and localized, which means that no one else captured it before and no one else could ever capture it again.

An example of non-creative, non-unique work is a straightforward photo of a stable, commonplace object such as a bottle of a well-known brand of liquor. Because the photo is straightforward and the object is stable and commonplace, someone else could have created it before and could create it later.

When we shift focus from originality to uniqueness, we can solve a variety of long-standing puzzles in copyright. Uniqueness explains why copyright protects a careless snapshot of drunken revelry more than a database of important historical data, a cartoon character more than a literary character, and a very short sample of a sound recording more than a short string of words. Uniqueness also illuminates the boundary between work that is copyrightable and work that is patentable.

Perhaps most surprisingly, uniqueness largely unifies copyright's many limiting doctrines, including the idea-expression dichotomy, fact-expression dichotomy, merger doctrine, useful article doctrine, and others. However, to fully explain the outcomes in cases involving the limiting doctrines, we must supplement uniqueness with a "dominance principle." The dominance principle limits copyright protection for a unique work if the unique work is a dominant work. A dominant work is a work that has itself become a constraint on others – for reasons other than the substantive merit of the creator's contribution to the dominant work. Examples of unique, dominant works include highly fanciful names, highly fanciful titles, the QWERTY keyboard layout, and the Lotus 1-2-3 spreadsheet menu. Footage of an event may qualify as dominant if the event is important and if the footage is the best record of the event. In such a case, fully protecting the footage would bestow a large windfall on its creator while deterring efficient use of the footage by others.